RECORD AND BRIEF

Supreme Court, U.S.
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No. 16-258

In The
Supreme Court of the United States

DIGNITY HEALTH, ET AL.,

Petitioners,

v.

STARLA ROLLINS,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY

The question presented is arising in nearly every circuit, is of enormous and recurring importance to a vast swath of health care providers nationwide, affects millions of employees, and will remain unsettled for years unless and until this Court resolves it. If this Court denies certiorari, religious nonprofits across the Third, Seventh, and Ninth Circuits who followed decades-old guidance from three federal agencies would be forced immediately to convert their pension plans from church plans to ERISA plans and will face claims for billions of dollars in retroactive liability. Religious nonprofits across the rest of the country would face paralyzing confusion and uncertainty.

Respondent does not dispute, or even confront, these points. She does not deny that the church-establishment question is immensely important or that this case squarely presents that question, and she does not suggest that further percolation would assist the Court. Instead she contends that the Court should deny certiorari because agency views are unworthy of reliance unless they are the product of notice-and-comment rules, a theory this Court rejected most recently just last Term. She also contends that Dignity Health fails to satisfy some other elements of the church plan exemption not passed upon below. But this Court regularly grants certiorari to decide issues of nationwide importance notwithstanding the presence of collateral issues that would need to be resolved following a reversal.

This Court should have the final say on the important question whether the church plan exemption contains a church-establishment requirement. And only this Court can resolve the disuniformity now

causing massive upheaval in the administration of pension plans by religious employers. Time is of the essence. The Court should grant certiorari now.

I. The Court Should Decide the Church-Establishment Question Now

1. Since 1983, the IRS, DOL, and PBGC have issued hundreds of opinions, letter rulings, and settlement agreements assuring church-affiliated employers that their pension plans are exempt from ERISA, regardless of whether a church established the plans. Pet. 16-17. Respondent agrees, but suggests that these opinions are due no deference and warrant no reliance. Opp. 15-19. This reasoning contradicts those agencies' own assurances, Pet. 17, and flies in the face of common sense. ERISA is a notoriously complicated, nationwide regulatory scheme. Organizations must be able to rely on the unanimous and longstanding opinions of the three agencies charged with interpreting that statute. And Dignity Health and countless other religious organizations like it *have* relied on these opinions for decades. Pet. 5-7, 16-19.[1]

Respondent contends that the Third, Seventh, and Ninth Circuits correctly refused to defer to the decisions of the IRS, DOL, and PBGC. But the courts' criticisms of the agency statements are unfounded. Pet. 33-34. That the IRS participated in the debate around the 1980 amendment and issued its interpretation of the amendment shortly thereaf-

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[1] Respondent suggests that IRS rulings apply only "with respect to ... tax-qualification status." Opp. 17. But employers can't operate a church plan for tax purposes but not ERISA purposes. The statutory exemption is the same, and the three agencies have agreed on one interpretation.

ter is further compelling reason to follow that interpretation; the IRS understood Congress to have *reversed* the IRS's own pre-1980 interpretation. Pet. 3-6.

Regardless of the extent to which these agency rulings deserve deference—a merits question—they demonstrate the need for this Court's review. Respondent does not dispute the basic facts—the three agencies agree there is no church-establishment requirement; the IRS and DOL have issued over 550 rulings to specific religious nonprofits applying that interpretation; religious nonprofits have followed those interpretations for decades; and before 2013, *no* court had ever imposed a church-establishment requirement. Because the new appellate decisions reflect a seismic shift, this Court manifestly should step in to decide whether religious organizations across three circuits must wholly overhaul their pension plans after decades of reliance on agency interpretations.

The Court's guidance is also imperative for religious organizations outside the Third, Seventh, and Ninth Circuits. Declining certiorari now would subject these organizations and their employees to years of crippling uncertainty about the exempt status of their pension plans. These organizations will be in a Catch-22: rely on agency guidance and risk lawsuits seeking bankruptcy-inducing penalties, or preemptively overhaul their plans at huge, irreversible expense. Respondent does not dispute that the impact of leaving the question unsettled will be enormous because the "vast majority" of church plans "were not established by churches." Opp. 19-20 (quoting Pet. 18). Respondent's contention that the impact is so vast because religious hospitals have "exploited a

misreading of ERISA" is a non-sequitur. Opp. 20. Whether or not it is a misreading is the question presented.

Respondent contends that not one of the agency interpretations is "precedential or reliance-worthy," because only notice-and-comment rules are "reliance-worthy." Opp. 15-16. The law (and common sense) are decidedly to the contrary. To be sure, PLRs and opinion letters do not receive *Chevron* deference. But they generate "serious reliance interests." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016); *see* Pet. 18. *Encino*, which was decided last term and respondent ignores, involved a DOL opinion letter. 136 S. Ct. at 2123, 2127; *see also Morton v. Ruiz*, 415 U.S. 199, 201-05 (1974) (granting certiorari in absence of split after lower court invalidated policy in BIA manual).[2]

The reliance interests are at their apex here. Dignity Health reasonably relied on *four* PLRs confirming its exempt status, and a PBGC settlement agreement. Pet. 2, 9-10, 17. Respondent's *ipse dixit* notwithstanding, a settlement agreement with the PBGC, which decides whether a plan is eligible for ERISA insurance coverage, is "reliance-worthy." Opp. 17. And respondent's discussion (Opp. 16-17) of the status of Dignity Health's PLRs is downright de-

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[2] The 1983 memorandum is not precedent for any *particular* taxpayer, Opp. 15, but its reasoning is the basis for 550-plus letters to specific religious organizations. And respondent misstates the IRS's view of PLRs. Opp. 16. "A taxpayer ordinarily may rely on a[n] [IRS] letter ruling," just not one "issued to another taxpayer." Rev. Proc. 2016-1, 2016-1 I.R.B. 1, § 11.01-.02 (citing 26 U.S.C. § 6110(k)(3)).

ceptive. Dignity Health sought a fifth PLR from the IRS in 2012, following a restructuring. But that request was entirely unrelated to any church-establishment requirement; a 2012 restructuring obviously could not (and did not) alter the nature of the entity that established the plan in 1989. Rather, Dignity Health's restructuring eliminated the Catholic Church's formal *control* over Dignity Health, but preserved an intimate *association*. ER 487-97. Dignity Health asked the IRS to review its new structure to confirm that the plan and related plans "continue to be 'church plans,'" on an association rather than a control theory. ER-487, 503-05. All three statements respondent cites (Opp. 16) referred to the *association or control* issue, not the church-establishment issue. ER-506.

A pension administrator's decision to alert the IRS about a change in plan structure does not operate as a revocation of the IRS's prior assessment of aspects of the plan that have not changed. Indeed, the Ninth Circuit cited all four PLRs issued to Dignity Health, App. 20a, without suggesting they were no longer applicable in light of the reorganization.[3]

2. The five amici that filed in support of the petitions in *Advocate* and *Saint Peter's* underscore the immediate and irreparable burdens at stake. Pet. 2, 28. Absent this Court's intervention, the court of appeals decisions will have a devastating financial effect on religious employers *and* plan participants. *See generally* Brief of Church Alliance as Amicus Curiae in Support of Petitioners (Nos. 16-74, 16-86); *Advocate* Reply 4-6; *Saint Peter's* Reply 3-6. Absent

[3] The IRS declined to review Dignity Health's renewed request in light of the litigation. Opp. 20.

this Court's intervention, petitioners and other religious nonprofits within the Third, Seventh, and Ninth Circuits must restructure their plans to comply with ERISA's manifold requirements. Respondent says "Congress deemed" these requirements "necessary" (Opp. 22), but that is the ultimate question in this case. And while respondent contends that certain plans have smoothly *ceased* complying with ERISA (Opp. 23), the burdens involved in *complying* with ERISA are much different.

Respondent denies that any harm to religious nonprofits would be "irreversible." Opp. 22. This Court presumably concluded that Dignity Health faced irreparable harm when it stayed the mandate in this matter on September 21. Moreover, even if church plans that converted to ERISA plans to comply with the three appellate decisions could theoretically regain church plan status, the Court should not force hundreds of religious nonprofits to undergo the immense costs and burdens of conversion when the Court could decide the issue now. Likewise, even if the PBGC could eventually reimburse improperly paid premiums (Opp. 23), the Court should not force a federal agency to collect premiums from hundreds of pension plans affecting millions of employees only to return those premiums later in the event of a reversal from this Court years from now.

Moreover, Dignity Health's claim has never been that reclaiming church plan status would be impossible as a formal matter, but rather that many of the *changes* it would be forced to undertake to convert to ERISA—like renegotiations of collective bargaining agreements—could be "irreversible." Pet. 20 (citing *Advocate* Pet. 19-21 & nn.19-21). In other words, Dignity Health likely would operate as an exempt

church plan but with many lingering ERISA features.

Nor is it "speculati[on]" (Opp. 22 n.17) that some church-affiliated employers will abandon their defined-benefit plans due to the unsustainable costs of ERISA. It is a statistical inevitability. *Advocate* Pet. 20-21. Congress expanded the exemption in 1980 precisely because "churches fear that many of the agencies would abandon their plans" given the "costs of complying with ERISA." 125 Cong. Rec. 10052 (1979). Respondent observes that non-religious employers comply with ERISA "without any apparent 'catastrophe,'" Opp. 22, but these employers do not offer *defined-benefit* plans, Pet. 9. ERISA compliance is twice as expensive for defined-benefit plans and is a major factor in the termination of such plans. *Advocate* Pet. 21.

These burdens are the tip of the iceberg. Respondent alleges that Dignity Health owes billions of dollars in penalties—for just one year. Pet. 21. She says such relief could be an "abuse of discretion" (Opp. 25), but tellingly does not offer to withdraw her demands. And those penalties aside, religious employers could find themselves in violation of federal securities laws, giving rise to potential civil monetary penalties and even criminal liability. Brief of Church Alliance 5-8.

More church plans are being sued, even since this petition was filed,[4] and respondent's counsel are

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[4] *E.g.*, Complaint, *Mollet v. Hosp. Sisters Health Sys.*, No. 16-cv-9238 (N.D. Ill. Sept. 26, 2016); Complaint, *Holcomb v. Hosp. Sisters Health Sys.*, No. 16-cv-3282 (C.D. Ill. Oct. 11, 2016); Complaint, *Sheedy v. Adventist Health System*, No. 16-cv-01893 (M.D. Fla. Oct. 28, 2016).

advertising for new plaintiffs against new hospitals. Religious organizations, courts, and federal agencies should not have to muddle through these questions now when the threshold question presented may render the entire enterprise unnecessary.

3. Granting the petition will impose no "costs" on employees. Opp. 20. Respondent contends that Dignity Health's plan is underfunded, but that is incorrect. App. 70a. The district court concluded that respondent "has not shown that the Plan is currently at risk of being underfunded" and that "to the contrary, [Dignity Health] ha[s] put forward evidence suggesting that the Plan is adequately funded for the next decade," App. 70a, meaning the district court did "resolve that dispute," *cf.* Opp. 21 n.14. Respondent's contrary allegations need not be "accepted as true," Opp. 21; the district court granted partial summary judgment, not a motion to dismiss.

Respondent's citation to the comparison of projected benefit obligations and plan assets in Dignity Health's financial statements (Opp. 21) is misleading and incorrect. Such statements rely on assumptions that are inapplicable to determining funding status under ERISA. *Palmason v. Weyerhaeuser*, 2013 WL 4511361, at *8 (W.D. Wash. 2013). The plan is funded well in excess of what ERISA considers adequate. Dignity Health has never failed to make annual contributions sufficient to cover its pension obligations, and respondent does not suggest otherwise. And the statement in the 2015 financials that Dignity Health "reduced its benefit obligation" in 2014 does not remotely mean that any employee lost any vested pension benefits, as respondent misleadingly implies. Opp. 21-22.

In the meantime, respondent fails to confront the serious risks inherent in fundamentally altering the pensions and benefits plans of tens of thousands of Dignity Health employees. As the Church Alliance explains and respondent does not dispute, loss of church-plan status could mean that plan participants would be taxed on benefits when they are vested, rather than distributed; amounts in trust to fund retirement benefits would be reduced by income taxes on the trust's earnings; and participants would be unable to defer federal income taxes by rolling distributions over into an IRA or another qualified plan. Br. 10-11. It is in employees' interests—in this case and across the country—to reach a nationwide resolution sooner rather than later. If this Court denies certiorari, hundreds of church plans across three circuits could be forced to convert to ERISA status only to switch back years later if this Court eventually rejects a church-establishment requirement. That is not in employees' interest.

Respondent asserts that the interlocutory posture of this appeal makes the case unworthy of review. She contends the Court should permit her other claims—including for billions of dollars in penalties—to be adjudicated *before* the Court decides the church-establishment question. But ERISA coverage is a threshold question, no facts or further percolation would illuminate the question, and it is ripe for decision. That is why this case was certified for and resolved via interlocutory appeal. It makes no sense to litigate the pending claims below to then return to this Court to finally resolve a by-then-long-overdue issue. That is not in the interest of employees *or* employers. And Dignity Health mentioned the $2 billion in charitable care it provides (Pet. 21) not for comparison with secular nonprofit hospitals (Opp.

24), but because forcing any nonprofit hospital to engage in massively expensive and potentially unnecessary litigation harms patients.

4. Respondent's alternative arguments in support of the judgment do not render this case a "poor vehicle." Opp. 36. This case squarely presents the church-establishment question. This Court regularly grants cases, including ERISA cases in an interlocutory posture, notwithstanding the presence of alternative arguments not passed upon by the courts below. *E.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 & n.1, 244 (2000). That is especially so when the question is an important issue requiring nationwide resolution. None of the collateral questions respondent raises affects the scope or importance of the question presented, or the Court's ability to decide that question.

Moreover, respondent's "principal purpose" argument is meritless for the reasons in the *Advocate* and *Saint Peter's* replies. And respondent's contention that Dignity Health shares no "common religious bonds and convictions" with the Catholic Church—an argument these church-plan lawsuits raise as a matter of course—is frivolous. 29 U.S.C. § 1002(33)(C)(iv); *see* Opp. 37. Respondent does not address any of the common bonds identified in the petition (at 8-9). Dignity Health restructured in 2012 to comply with a new policy set forth by the United States Conference of Catholic Bishops. ER-163, 166. The restructuring was overseen by the Archbishop of San Francisco, who issued a *nihil obstat*—a formal Catholic theological statement of nonobjection—declaring that post-restructuring, Dignity Health would continue to "comply[] with Catholic moral teaching." ER-158. The statements respond-

ent cites (Opp. 37) are wrenched out of context; they reflect that Dignity Health is no longer controlled by or part of the Catholic Church, in the way that its Sponsoring Congregations are. It is impossible to infer from the *nihil obstat* that the Archbishop has declared that Dignity Health no longer shares common bonds and convictions with the Catholic Church. The Archbishop touted the "vital Catholic evangelical influence on the new system's mission and culture." ER-167. In any event, respondent does not dispute that "[n]one of the issues decided by the district court or the Ninth Circuit, or presented for this Court's review, turns on anything that occurred in the 2012 restructuring." Pet. 10 n.7.

II. Absent Review, ERISA Will Apply Differently In Different Circuits

As the replies in *Advocate* and *Saint Peter's* explain, respondent is wrong to dispute the existence of a circuit split. *Advocate* Reply 7-10; *Saint Peter's* Reply 8-10. But whether or not there is a crisp circuit conflict in the sense of conflicting holdings, there is manifestly a crisp conflict in practice. The lower courts have repeatedly acknowledged the division. App. 66a; *Advocate* Reply 7-8; *Saint Peter's* Reply 8. If this Court denies certiorari, materially identical pension plans will be subject to ERISA in some jurisdictions and not in others, because plans outside the Third, Seventh, and Ninth Circuits will continue to operate as church plan regardless of whether they were established by churches. And class-wide settlements allowing plans to retain church-plan status absolutely have "[some]thing to do with the existence of a circuit split," *cf.* Opp. 14; courts could not approve such settlements if under governing law the plans are subject to ERISA. This ongoing conflict

severely undermines ERISA's goal of national uniformity, and renders this Court's review imperative.

III. There Is No Church-Establishment Requirement

On the merits, respondent largely repeats or refers to arguments in the briefs in opposition in *Advocate* and *Saint Peter*'s. Dignity Health likewise refers the Court to the *Advocate* and *Saint Peter's* replies. Like respondents in those cases, respondent remains unable to explain why Congress included the word "established" in subparagraph C if it did not intend to alter the establishment requirement. In any event, even the courts that have interpreted the statute to contain a church-establishment requirement have conceded that there is substantial ground for disagreement. App. 66a. The Court should hear the case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 1, 2016

REFER TO CASE 16-74 FOR ALL VIDED BRIEFS